SUPREME COURT, U. S.

No. 1255

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

REUBEN L. JONES,

Appellant,

vs.

STATE OF LOUISIANA,

Appellee.

Appeal from the Supreme Court of Louisiana.

APPELLANT'S JURISDICTIONAL STATEMENT

JACK & JACK, ATTORNEYS
By Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana

Attorneys for Appellant

ATTORNEY OF RECORD:
BILLY R. PESNELL,
Texas Eastern Building
Shreveport, Louisiana.

LECOMTE, SHREVEPORT, LOUISIANA

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I. OPINION BELOW

The Opinion of the Supreme Court of Louisiana is reported at ..... La. ....., 204 So. 2d 775 and is appended hereto. There are no other reported opinions.

II. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

This is an appeal taken under 28 U.S.C. 1257 (2) from the final judgment of the Supreme Court of Louisiana in the reported state criminal case of *State of Louisiana vs. Reuben L. Jones*, Number 48,610 on the docket of that court. The judgment of that court became final

December 27, 1967 and was apparently entered the following day. Notice of appeal was filed in that court on or about January 6, 1968.

The validity of the following state statutes and state constitutional provisions was drawn in question below on the ground of their being repugnant to the jury trial provision of the Sixth Amendment to the Constitution of the United States as made applicable to the States by the Fourteenth Amendment to the Constitution of the United States: Louisiana Constitution of 1921, Article VII, Section 41; Louisiana Code of Criminal Procedure, Articles 779 and 933 (3) and (4) (former Louisiana Revised Statutes 15:340 and 341); Louisiana Revised Statutes 14:95 A. (3); and Louisiana Revised Statutes 14:284. The decision below was in favor of the validity of these provisions. The full text of these provisions is appended hereto.

III QUESTIONS PRESENTED

(1) Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a one-year prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

(2) Do state statutes that deny the right to trial by jury in a prosecution for Possession of Burglar Tools, where a two-year prison term may be imposed and a one-year prison term is actually imposed, violate the Sixth

and Fourteenth Amendments to the United States Constitution?

(3) Do. state statutes that deny the right to trial by jury in a prosecution for Peeping Tom, classified among "OFFENSES AFFECTING PUBLIC MORALS", where a six-month prison term may be and is actually imposed, violate the Sixth and Fourteenth Amendments to the United States Constitution?

IV. STATEMENT OF THE CASE

Reuben L. Jones, Appellant herein, was charged with Possession of Burglar Tools by Bill of Information filed by the District Attorney in the First Judicial District Court of Louisiana July 8, 1966. On that same date, an additional Bill of Information was filed therein charging Appellant with the curious offense of Peeping Tom, alleged to have been committed at the same time and place as the Possession of Burglar Tools. On August 16, 1966, another Bill of Information was filed in that court charging Appellant with a second and separate violation of Possession of Burglar Tools.

In Louisiana, Possession of Burglar Tools is a crime punishable by a term of one years imprisonment on the first conviction and two years imprisonment on the second conviction. La. Rev. Stat. 14:95. Peeping Tom is punishable by six-months imprisonment. La. Rev. Stat. 14:284. Because both offenses are not punishable by "imprisonment at hard labor", state law categorizes them as "misdemeanors". La. C.Cr.P., Art. 933 (3) and

(4). Article 779 of the Louisiana Code of Criminal Procedure in express terms denies the right to trial by jury in cases classified as "misdemeanors". The phrase "imprisonment at hard labor" is a term of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parsh jail. It has been expressly held that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State vs. Hamilton*, 128 La. 91, 54 So. 482.

Prior to trial in the state court, Appellant filed on October 18, 1966 a "Motion For Trial By Jury" in each of these three criminal prosecutions. In each of these three written motions, Appellant urged that he was "entitled under the Sixth and Fourteenth Amendments to the Constitution of the United States to a trial by an impartial jury." The motions were overruled by the trial judge on the authority of existing state law. Appellant excepted to the ruling of the court and reserved and subsequently perfected formal bills of exception. These bills as perfected constituted the essential parts of the record considered by the Supreme Court of Louisiana in its written opinion appended hereto.

Trial was had on all three charges on December 9, 1966 before a judge sitting alone without jury. The judge found Appellant guilty on all three charges.

That the defendant was prejudiced by the denial of his Sixth Amendment right to trial by an impartial jury is clearly illustrated by the revealing comments of the

trial judge in his opinion denying the defendant's motion for a directed verdict found on page 28 of the Transcript of Testimony in No. 68,964:

> THE COURT: This is a borderline case with borderline evidence. But the distinguishing part of this case and any other like it is Reuben Jones, and he is well known. He has been convicted before. When you think of house prowling, you think of Reuben Jones. He was known to the officers as having been a burglar. *He is known to the Court as having been a burglar before these cases today ever began. We are not required to put away the knowledge that we acquire in the ordinary course of living.* (Emphasis added).

Had plaintiff been given a trial by jury, he would have had the right to examine prospective jurors on *voir dire* concerning their knowledge of the defendant and to challenge for cause those prospective jurors who knew the defendant ". . . as having been a burglar before these cases today ever began . . ." and who could not put away in their minds such knowledge even though they had acquired it ". . . in the ordinary course of living".

Appellant then appealed to the Supreme Court of Louisiana. The decision of that court, as reported in the appended opinion, was in favor of the validity of the state law denying trial by jury in cases determined by the Legislature to be "misdemeanors". Appellant is presently at liberty on bond.

(4). Article 779 of the Louisiana Code of Criminal Procedure in express terms denies the right to trial by jury in cases classified as "misdemeanors". The phrase "imprisonment at hard labor" is a term of art used in Louisiana Law denoting confinement in the state penitentiary as opposed to confinement in the parsh jail. It has been expressly held that confinement in the parish jail subject to actual physical hard labor in a road gang is not "imprisonment at hard labor". *State vs. Hamilton*, 128 La. 91, 54 So. 482.

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V. SUBSTANTIAL FEDERAL QUESTIONS

The questions presented by this appeal clearly are substantial. The case of *Gary Duncan vs. State of Louisiana*, Number 410 in the Supreme Court of the United States is presently before the Court on appeal from the Supreme Court of Louisiana, probable jurisdiction having been noted therein by the Court on October 9, 1967. The *Duncan* case involves the same question presented by this appeal, although the matter is more broadly stated and presented by that case. The offenses involved in this instant appeal clearly involve moral turpitude, and the sentences actually imposed, six months and one year, are substantially longer than the sixty day sentence imposed in the *Duncan* case. We had hoped to delay docketing this appeal until after a decision was reported in the *Duncan* case so that we might more carefully delineate the precise issues if the decision in the Duncan case was adverse to the Appellant, but we were unable to do so because of the running of time.

Regardless of the decision in the Duncan case, the questions presented by this appeal should receive plenary consideration, with briefs on the merits and oral argument because of the extensive consideration given to the issue by the Louisiana Supreme Court in its written opinion appended hereto. In short, we submit that Appellant herein should not be penalized for having brought his case before this court by way of the Supreme Court of Louisiana rather than directly to this court from the trial court as was done in the *Duncan* case. By appealing to the Supreme Court of Louisiana, Appellant provided that

court with an opportunity to reappraise its prior jurisprudence in the light of recent decisions of this court which make it clear that this court ". . . has rejected the notion that the Fourteenth Amendment applies to the states only a 'watered-down subjective version of the Bill of Rights,' . . . " *Malloy vs. Hogan*, 378 U.S. 1, 84 Supreme Court 1489, 1498. Although in retrospect, our appeal to the Supreme Court of the State of Louisiana may appear to some eyes to have been somewhat quixote, it did produce the clear and unequivocal opinion appended hereto.

This appeal should be heard and the decree of the Louisiana Supreme Court as set out in the appended opinion should be reversed.

Respectfully submitted,

JACK & JACK

By: .....

Wellborn Jack, Jr.
1625 Slattery Building
Shreveport, Louisiana

Attorneys for Appellant

ATTORNEY OF RECORD:

.....

Billy R. Pesnell,
Texas Eastern Building,
Shreveport, Louisiana.

March, 1968

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VII, Section 41 of the Louisiana Constitution of 1921:

> . . . All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

Article 779, Code of Criminal Procedure of Louisiana:

> Trial of Misdemeanors
>
> A defendant charged with a misdemeanor shall be tried by the court without a jury.

Article 933, Code of Criminal Procedure of Louisiana:

> Offenses
>
> Except where the context clearly indicates otherwise as used in this Code:
>
> * * * * *
>
> (3) "felony" means an offense that may be punished by death or imprisonment at hard labor.
>
> (4) "misdemeanor" means any offense other than a felony, and includes the violation of an ordinance providing a penal sanction.

Louisiana Revised Statutes 14:95:

Illegal carrying of weapons

A. Illegal carrying of weapons is:

* * * *

(3) The ownership, possession, custody or use of any tools, or dynamite or nitroglycerine, or explosives, or other instrumentality customarily used by thieves or burglars at any time by any person with the intent to commit a crime;

* * * *

B. Whoever commits the crime of illegal carrying of weapons shall be fined not more than $500.00, or imprisoned for not more than one year or both.

C. On a second conviction, the offender shall be fined not less than $200.00 nor more than $1,000.00, or imprisoned for not more than two years, or both.

Louisiana Revised Statutes 14:284:

Peeping Tom; penalty

No person shall perform such acts as will make him a "Peeping Tom" on or about the premises of another, or go upon the premises of another for the purpose of becoming a "Peeping Tom".

"Peeping Tom" as used in this Section means one who peeps through windows or doors, or other places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon. It is not a necessary

element of this offense that the "Peeping Tom" be upon the premises of the person being spied upon.

Whoever violates this Section shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.



STATE of Louisiana

v.

Reuben L. JONES (Reuben Leroy Jones).

No. 48610.

Supreme Court of Louisiana.

Dec. 11, 1967.

Defendant was convicted in the First Judicial District Court, Parish of Caddo, John A. Dixon, Jr., J., of possession of burglary tools and of violating the Peeping Tom statute, and he appealed. The Supreme Court, McCaleb, J., held, inter alia, that an unbiased judge can dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge, and such being so no reason exists for declaring that Sixth Amendment provision for trial by jury is made obligatory upon the states by the Fourteenth Amendment.

Affirmed in part, appeal dismissed in part.

1. Criminal Law ⇐1020

Supreme Court was without jurisdiction of appeal taken from conviction of violating Peeping Tom statute since sentence imposed for that violation did not exceed six months in prison. LSA–R.S. 14:284; LSA–Const. art. 7, § 10.

2. Criminal Law ⇐1020

Supreme Court had no jurisdiction of appeal from conviction where sentence did not exceed six months in prison, as against contention that it had jurisdiction under constitutional article declaring that if the case is appealed properly to the Supreme Court on any issue it has appellate jurisdiction over all other issues involved, where appeal from defendant's conviction for violation of Peeping Tom statute was separate and distinct from his appeals from convictions in the other two cases, the three appeals having been improperly filed as one appeal. LSA–R.S. 14:284; LSA–Const. art. 7, § 10.

3. Jury ⇐22(2)

Constitutional right of trial by jury does not extend to trials for petty offenses.

4. Criminal Law ⇐633(1)

A "fair trial" means simply a trial that is just and in which the accused is given benefit of all the safeguards provided by the Constitution and laws, and in which even-handed justice is dispensed.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⇐267

An unbiased judge can dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge, and such being so no reason exists for declaring that Sixth Amendment provision for trial by jury is made obligatory upon the states by the Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐1134(3)

Complaint that evidence is insufficient to sustain conviction presents nothing for review by Supreme Court on appeal since it

is without jurisdiction to determine questions of fact in a criminal case.

7. Criminal Law ⇐1035(3), 1090(11)

Argument raised for first time in Supreme Court that defendant was prejudiced by denial of his rights to trial by jury because of comments made by trial judge in overruling motion for directed verdict would not be considered since motion for directed verdict was not founded on that ground, and no objection was made or a bill of exceptions taken to alleged improper remarks of judge at time they were given.

Jack & Jack, by Wellborn Jack, Jr., Shreveport, for defendant-appellant.

Jack P. F. Gremillion, Atty. Gen., William P. Schuler, Asst. Atty. Gen., John A. Richardson, Dist. Atty., Charles R. Lindsay, Asst. Dist. Atty., Albert S. Lutz, Jr., Asst. Dist. Atty., for appellee.

McCALEB, Justice.

Appellant was charged in bills of information with two separate violations of R.S. 14:95(3) for possession of burglar tools, and also for violating R.S. 14:284, the Peeping Tom statute. He was tried, found guilty in all three cases, and sentenced to serve one year in the parish prison on each charge for possession of burglar tools, and six months for violation of R.S. 14:284, all sentences to run concurrently. From these convictions and sentences appellant has prosecuted a single appeal to this Court.

[1] Aside from the fact that the taking of one appeal from three separate sentences for disconnected violations of one statute and the violation of another statute is improper, we note at the outset that this Court is without jurisdiction of the appeal taken from appellant's conviction of violating the Peeping Tom statute, for the sentence imposed by the trial judge for that violation did not exceed six months in prison.

Section 10 of Article VII of our Constitution provides:

"The following cases only shall be appealable to the Supreme Court:

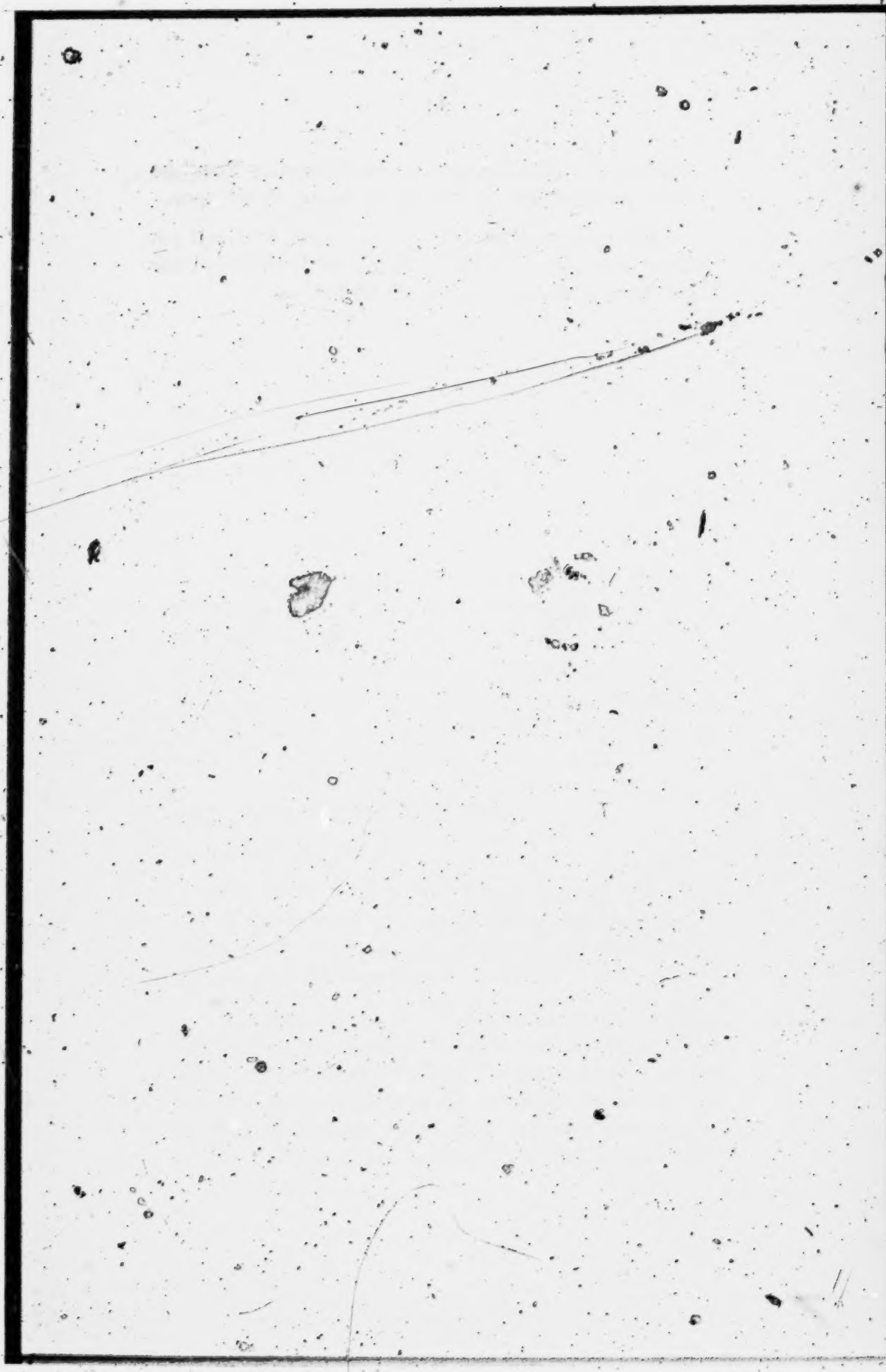
* * * * * * *

(5) Criminal cases in which the penalty of death or imprisonment at hard labor may be imposed, or in which a fine exceeding three hundred dollars or imprisonment exceeding six months has been actually imposed."

Since violation of R.S. 14:284 is a misdemeanor and the sentence imposed thereunder does not exceed six months, this Court is without jurisdiction of appellant's appeal from that conviction. His counsel, however, evidently realizing that this Court is without jurisdiction of that appeal, argue that such jurisdiction conferred on us by the last paragraph of Section 10 of Article VII of the Constitution, which declares that, if a case is appealed properly to this Court on any issue "* * * the Supreme Court has appellate jurisdiction over all other issues involved in the case."

[2] This contention is without substance for the reason that the appeal from appellant's conviction under R.S. 14:284 is separate and distinct from his appeals from the convictions in the other two cases. There are three cases and three appeals which have been improperly filed as one appeal. The constitutional provision relied on by counsel applies to a single case presenting several issues. In such instances, if this Court has jurisdiction on only one issue, it has the right to take cognizance of and decide all other issues, even though those issues would not be directly appealable here. Such is not the case here and, hence, the appeal from the conviction under R.S. 14.284 must be dismissed.

Considering now the appeals from the convictions under R.S. 14:95(3), we note that, whereas several bills of exceptions were reserved during the trial of the case, all have been abandoned except two which



will hereinafter be discussed. These bills do not bear the same numbers in each case, and for this reason they will not be referred to by number but only by content.

Appellant filed motions for a trial by jury in the prosecutions, contending that he is entitled to a jury trial of these misdemeanor cases under the Sixth and Fourteenth Amendments to the Constitution of the United States. These motions were overruled by the trial judge and bills of exceptions duly reserved.

Under the Louisiana procedural system in criminal cases, all misdemeanors, i. e. —cases in which the punishment may not be at hard labor—"* * * shall, until otherwise provided by law, be tried by the judge without a jury" as specified in Section 41 of Article VII of our Constitution, and is also provided by R.S. 15:340 and 341.[1]

Our jurisprudence has rigorously adhered to these constitutional and statutory provisions, holding that an accused in criminal cases is not entitled to a trial by jury where a sentence at hard labor cannot be imposed. State v. Hadad, 142 La. 69, 76 So. 243; State v. Green, 210 La. 190, 26 So.2d 693; State v. Melerine, 236 La. 929, 109 So.2d 471; State v. Garrison, 244 La. 787, 154 So.2d 400; and State v. Henry, 250 La. 682, 198 So.2d 889.

Defense counsel recognize, as they must, the well-defined procedural law of Louisiana. But, pointing to the upheaval in State criminal proceedings wrought by comparatively recent changes in the jurisprudence of the Supreme Court of the United States, which have overturned the long established jurisdictional concept that the first eight Amendments to the Federal Constitution are not applicable to the States (see e. g. Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97), counsel proclaim that, by virtue of the due process clause of the Fourteenth Amendment, appellant was entitled to a jury trial of the misdemeanors for which he was convicted in the court below. In support of this position, counsel cite among others, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, 84 A.L.R.2d 933; Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733; Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; and Klopfer v. State of North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1.

The Sixth Amendment to the Federal Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *".

A literal reading of this provision indicates that the framers of the Constitution were referring to Federal tribunals exclusively in providing the place in which trials were to be had, as reference is made to trials in the "* * * district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *", meaning the federal district courts.[2] However, in view of the rationale expressed by the United States Supreme Court in Gideon v. Wainwright, as restated in Pointer v. State of Texas (1965), and reaffirmed in Klopfer v. State of North Carolina (1967), to the effect that any provision of the Bill of Rights which is "'fundamental and essential to a fair trial' is made obligatory upon

1. The proceedings in the instant cases were had before the adoption of the New Code of Criminal Procedure. But see also Articles 779 and 933(4) of the New Code.

2. The first federal district courts were established by Congress under the Judiciary Act of 1789 and the Bill of Rights, comprising the first ten Amendments to the Federal Constitution, was not adopted until 1791.

the States by the Fourteenth Amendment", it must be ascertained whether the federal constitutional right to a jury trial in criminal cases is basically essential to a fair trial of a misdemeanor in the state courts.

Counsel for appellant do not suggest that in all misdemeanor cases in the state courts. On the contrary, it is their position that right to a jury trial in misdemeanor cases is to be determined by the nature of the charge, that is, that charges which are merely malum prohibitum do not require a jury trial, but that the trial of offenses, which are malum in se, require a jury trial to comply with the constitutional guarantee. This theory is said to be sustained by the Supreme Court of the United States in two cases arising in the District of Columbia and, in support of their contention, counsel cite District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177, and District of Columbia v. Clawans, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843.[3]

[3] It seems to be well established by the decisions of the United States Supreme Court that the constitutional right of trial by jury does not extend to every criminal proceeding, and that a jury is not demandable in trials for petty offenses. Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223; District of Columbia v. Clawans, supra; Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629, and the many authorities there cited. A petty offense is classified in 18 U.S.C.A. § 1 (1964 ed.) as: "(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both * * *".

Under the constitutional test laid down in the Colts and Clawans cases, which relate to the moral quality of the offenses rather than the severity of the penalty, counsel submit that, since the possession of burglar tools is malum in se and carries the stigma of moral disapprobation, the guarantee of the Sixth Amendment must be applied by the court.[4] Likewise, under the classification of offenses provided by 18 U.S.C.A. § 1, the offense of possessing burglar tools would require trial by jury since the maximum sentence exceeds six months imprisonment.

[4, 5] Nevertheless, this is not the real question posed for our decision. The real question is simply whether a trial by jury was a prerequisite to due process or an essential to a fair trial in the state court for any misdemeanor case. On this issue we reject appellant's arguments. For, aside from the fact that our Constitution and laws do not sanction jury trials in misdemeanor cases and that we would not, under any circumstances, order a jury trial unless required to do so by final judgment of the United States Supreme Court, we are unable to perceive that an accused in a misdemeanor case is necessarily denied due process or a fair trial when he is tried by a judge instead of a jury. A fair trial, as we understand the expression, means simply a trial that is just; a trial in which

3. In the Colts case, where the charge was reckless operation of a motor vehicle, the court held there was a right to trial by jury since the offense was "grave". In the Clawans case, where the charge was selling secondhand property without a license, the court held no jury trial was constitutionally required because the moral quality of the charge was relatively inoffensive.

4. In addition, counsel point to the fact that the United States Supreme Court has granted writs in Duncan v. Louisiana, No. 410 on the Docket of that Court, to review the question of whether a jury trial is constitutionally required by the Sixth Amendment in all state court criminal prosecutions for misdemeanors. It is stated in the brief that this case is set for argument December 18, 1967, 388 U.S. —, 88 S.Ct. 98, 19 L.Ed.2d 63.

However, we prefer not to delay our decision herein because of the pendency of that case, as it is not ordinarily our policy to withhold decisions in matters under advisement until the views from other courts on the same subject have been expressed.

the accused is given the benefit of all the safeguards provided by the Constitution and laws and one in which even-handed justice is dispensed. We cannot conceive, in the absence of proof to the contrary, that there is any rational basis for declaring that an unbiased judge cannot dispense justice in a misdemeanor case with the same quality of fairness and impartiality which could be expected of a jury which acts under the instructions of the judge. If this is so, and we think it is, we are unable to fathom any reason for declaring that the provision contained in the Sixth Amendment for trial by jury "* * * is made obligatory upon the States by the Fourteenth Amendment" as stated in Gideon v. Wainwright.

The next bills of exceptions were taken when the trial judge overruled motions for a directed verdict. Defense counsel argue in their brief filed in this Court that appellant was prejudiced by denial of his right to trial by jury because of certain comments made by the trial judge in overruling the motion for a directed verdict in the case bearing the District Court No. 68,-964. However, the formal bills in the record on this motion recite "* * * defendant moved for a directed verdict on the ground that the evidence was insufficient to sustain a conviction."

[6] It is well settled that the complaint that the evidence is insufficient to sustain a conviction presents nothing for our review on appeal, as this Court is without jurisdiction to determine questions of fact in a criminal case. State v. Crovetto, 229 La. 793, 86 So.2d 907; State v. Domino, 234 La. 950, 102 So.2d 227; and State v. Melerine, 236 La. 881, 109 So.2d 454. Compare State v. Gatlin, 241 La. 321, 129 So. 2d 4.

[7] The argument raised for the first time in this Court, that appellant was prejudiced by denial of his right to trial by jury because of the comments made by the trial judge in overruling the motion for a directed verdict will not be considered as the motion for a directed verdict was not founded on that ground, and no objection was made and a bill of exceptions taken to the alleged improper remarks of the judge at the time they were given.

For the reasons assigned appellant's appeal from his conviction for violating R.S. 14:284 is dismissed. As to his other appeals, the convictions and sentences are affirmed.

